



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Temps & Co.--Claim for Costs

File: B-221846.2

Date: August 28, 1986

DIGEST

1. Although original protest was sustained, subsequent claim for the recovery of protest costs on the ground that the recommended corrective action--non-exercise of options and resolicitation--is an ineffective remedy is denied where the protester was largely responsible for the substantial performance of the base year of an improperly awarded contract due to the fact that the firm's submission alleging material defects in the solicitation had been untimely filed, and the General Accounting Office (GAO) only considered the merits of the protest under its "significant issues" exception to its filing requirements because this was the first instance in which the contracting agency was before GAO in a bid protest matter.
2. Claim for the recovery of bid preparation costs is denied where there has been no reasonable showing that the protester would have had a substantial chance of receiving the award but for the agency's utilization of a materially defective method for evaluating bids.

DECISION

Temps & Co. submits a claim for the recovery of its protest and bid preparation costs pursuant to our decision in Temps & Co., B-221846, June 9, 1986, 65 Comp. Gen. ____, 86-1 CPD ¶ 535. In that decision, we sustained Temps' protest against the award of a contract for temporary clerical services to Woodside Temporaries, Inc., under invitation for bids (IFB) No. C66025, issued by the Federal Home Loan Bank Board (FHLBB). We concluded that the IFB was materially defective, as alleged by Temps, because the method for evaluating bids involved only a simple numerical averaging of submitted labor category hourly rates, and did not provide for the extension or "weighting" of those hourly rates by the government's best estimate of the quantities of hours required to determine the bid that would result in the lowest ultimate cost to the government. Thus, since Woodside's submitted hourly rates had no direct relationship with the total amount of work to be performed, the agency had no reasonable assurance that the award to Woodside would, in fact, result in the most favorable acquisition cost.

036551/130867

Accordingly, we recommended that no options be exercised under Woodside's current contract and that any remaining requirement be resolicited under a properly constructed IFB. The agency has advised this Office that it is implementing our recommendation.

Temps now claims the recovery of its costs for filing and pursuing the protest, including attorney's fees, and its bid preparation costs, on the ground that so little time remains until the end of the base year of performance that termination of Woodside's contract and resolicitation at this point will not provide Temps with meaningful relief. The firm also asserts that it is entitled to its costs, regardless of whether other effective relief will be afforded, on the basis that it is the prevailing party in the protest.

In the circumstances, we deny the claim for costs.

Our Bid Protest Regulations provide for the recovery of the costs of filing and pursuing a protest, including attorney's fees, in situations where the contracting agency has unreasonably excluded the protester from the procurement, except where this Office recommends that the contract be awarded to the protester, and the protester receives the award.

4 C.F.R. § 21.6(e) (1986). The recovery of protest costs may be allowed where, because recompetition of the base year of performance is not feasible, we have recommended that the agency not exercise any options under the contract and resolicit using proper procedures after the initial contract term expires. EHE National Health Services, Inc., 65 Comp. Gen. 1 (1985), 85-2 CPD ¶ 362; E.H. Pechan & Assoc., Inc., B-221058, Mar. 20, 1986, 86-1 CPD ¶ 278.

Temps urges that those cases are applicable here. Temps contends that Woodside's substantial performance of the base year was the direct result of the FHLBB's failure to provide Temps with timely notice of the award, thus precluding the firm from filing its protest within 10 calendar days of the award so as to invoke an immediate suspension of further contract performance. See 31 U.S.C. § 3553(d)(1) (Supp. III 1985); 4 C.F.R. § 21.4(b).

We do not believe that Temps is entitled to its protest costs. Despite any delay on the agency's part in providing notice of the award^{1/}, the firm itself was largely responsible for Woodside's substantial performance of the base year. As noted in our June 9 decision, Temps'

^{1/} The record does not support Temps' assertion. The FHLBB stated in its administrative report on the protest that written notice of the award to Woodside was mailed to all unsuccessful bidders 1 day after the award had been made.

protest alleged improprieties existing in the IFB which should have been apparent to the firm prior to the bid opening date, but Temps did not file its protest with this Office until 1 month later. However, while the protest submission was clearly untimely, 4 C.F.R. § 21.2(a)(1), we considered the matter under our "significant issues" exception to our timeliness requirements, 4 C.F.R. § 21.2(c), because this was the first occasion when the FHLBB was the affected "federal agency" in a bid protest matter. If Temps had protested the alleged IFB defects in a timely manner prior to bid opening, the agency, absent a determination of urgent and compelling circumstances, would have been required to withhold the making of any award while the protest was pending, 31 U.S.C. § 3553(c)(1); 4 C.F.R. § 21.4(a), and the result of which Temps now complains, the near expiration of the base contract term, would not have occurred.

Therefore, although Temps has lost the opportunity to compete for the base year of performance as did the protesters in EHE National Health Services, Inc., 65 Comp. Gen. 1, supra, and E.H. Pechan & Assoc., Inc., B-221058, supra, we conclude that recovery of the firm's protest costs is not warranted.

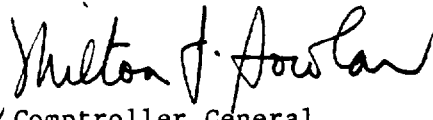
To the extent Temps also seeks to recover its bid preparation costs, we will allow the recovery of bid or proposal preparation costs only where (1) the protester had a substantial chance of receiving the award but was unreasonably excluded from the competition, and (2) the remedy recommended by this Office is not one delineated in our Regulations at 4 C.F.R. § 21.6(a)(2-5). Asbestos Abatement of America, Inc., B-221891, et al., May 7, 1986, 86-1 CPD ¶ 441.

We never determined in our prior decision that Temps would have had a substantial chance of receiving the award if the agency had utilized a proper method for evaluating bids. Given the defective nature of the solicitation, there is nothing to establish that Temps would have been in line for award. Hence, because the "substantial chance" test has not been reasonably met, we also conclude that Temps is not entitled to recover its bid preparation costs. Cf. Motorola, Inc., B-222181, July 11, 1986, 86-1 CPD ¶ ____ (proposal preparation costs recoverable where protester should have received the award under the specifications as written).

Finally, Temps asserts that, regardless of the effectiveness of the relief provided, it is entitled to its costs as the prevailing party. Temps refers to a recent decision by the General Services Board of Contract Appeals (GSBCA), which held that the Competition in Contracting Act of 1984 (CICA) should be construed as permitting the recovery of attorney's fees by the prevailing party even where an adequate remedy has been afforded the party. (In the case in question, the agency agreed to conduct a new procurement on an unrestricted basis.) NCR Comten, Inc., GSBCA No. 8229, Feb. 10, 1986, 86-2 BCA ¶ 18822.

However, it is our standards for the recovery of costs that govern here, in reflection of the express authority granted to this Office under section 2741(a) of CICA to determine whether a solicitation for a contract, proposed award, or award of a contract complies with statute or regulation, and, if not, to declare whether an appropriate interested party is entitled to its costs. 31 U.S.C. §§ 3554(b) and (c). Applying those standards to the facts of the case, we have determined that Temps is not so entitled.

The claim for costs is denied.

for 
Comptroller General
of the United States